No. 15387

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JO EISINGER and LORAIN B. EISINGER,

*Appellants,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Appellee.*

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## APPELLANTS' BRIEF.

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## APPELLANTS' BRIEF.

---

### Statement of Pleadings and Facts Disclosing Basis for Jurisdiction of Tax Court and Court of Appeals.

#### (a) Basis of Jurisdiction of the Tax Court of the United States.

Internal Revenue Code Section 272 (1939 Code) provided in part as follows:

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed . . . the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed . . . the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency."

[Sec. 6212(a) and Sec. 6213(a) of the 1954 Code are substantially the same as Sec. 272 of the 1939 Code.]

Appellants' petition to the Tax Court of the United States provided in part:

> "2. The notice of deficiency (a copy of which is attached and marked Exhibit 'A') was mailed to the petitioners, care of their attorney, Aaron B. Rosenthal, 416 West Eighth Street, Suite 1009-16, Los Angeles 14, California, on January 29, 1953." [Tr. Rec. p. 5.]

The petition to the Tax Court for redetermination of the deficiency was filed by appellants on April 17, 1953, that is, within ninety (90) days of mailing of the notice of deficiency. [See Docket Entries, Tr. Rec. p. 3.]

Therefore, the Tax Court had jurisdiction to determine the petition for redetermination filed by appellants.

**(b) Basis of Jurisdiction of the United States Court of Appeals for the Ninth Circuit.**

Internal Revenue Code, Section 7482 (1954 Code) provides in part as follows:

> "(a) *Jurisdiction.*—The United States Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. . . ." [Sec. 1141(a) 1939 Code substantially unchanged.]

Internal Revenue Code, Section 7483 (1954 Code) provides in part:

> "The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in

> Section 7482 if a petition for such review is filed by . . . the taxpayer within 3 months after the decision is rendered." [Sec. 1142 in part, of the 1939 Code, unchanged.]

The returns for the calendar years 1949 and 1950, the years in question, were filed by appellants with the then Collector of Internal Revenue for the Sixth District of California at Los Angeles, California [See "Petition", Tr. Rec. p. 5 and "Petition for Review", Tr. Rec. p. 53].

The United States Court of Appeals for the Ninth Circuit is the Circuit Court in which is located the Los Angeles, California Office of the then Collector of Internal Revenue (28 U. S. C. A., Sec. 41).

The decision of the Tax Court in *Eisinger et ux. v. Commissioner,* Docket No. 47871 was rendered on June 13, 1956 [See "Decision", Tr. Rec. p. 52]. The Petition for Review was filed by appellants in The United States Court of Appeals for the Ninth Circuit on September 10, 1956, which was within three months of rendition of the Tax Court Decision [See "Docket Entries", Tr. Rec. p. 4].

Therefore, the United States Court of Appeals for the Ninth Circuit has jurisdiction to hear and determine this appeal.

## Statement of the Case.

Jo Eisinger and Lorain B. Eisinger appeal, by way of Petition to Review [Tr. Rec. p. 53], a decision of The Tax Court of the United States entered on June 14, 1956, in cause entitled Jo Eisinger and Lorain B. Eisinger, Petitioners, v. Commissioner of Internal Revenue, Respondent, Docket No. 47,871 [Tr. Rec. p. 52]. The

controversy involves the proper determination of petitioners' liability for Federal Income Taxes for the years ending December 31, 1949, and December 31, 1950. The facts giving rise to the case are as follows:

On March 28, 1949, Jo Eisinger and his former wife, Wilhelmina Eisinger, entered into a written property settlement agreement, which was amended on April 28, 1949 [Tr. Rec. pp. 38-39]. The agreement as amended, provided that Jo Eisinger would pay to Wilhelmina Eisinger, a stipulated sum of money per week, and was incorporated into a final decree entered in a divorce action on May 26, 1949 [Tr. Rec. p. 39].

On their 1949 and 1952 Income Tax Returns, petitioners deducted the amounts of $3,850.00 and $6,677.00, respectively, as alimony paid to Wilhelmina Eisinger pursuant to said property settlement agreement [Tr. Rec. p. 54]. The Commissioner of Internal Revenue determined that of such payments, the sums of $1,925.00 and $3,364.50 represented payments for the support of Jo Eisinger's two minor sons for the years 1949 and 1950 respectively [Tr. Rec. pp. 37-38].

Appellants filed a petition for a redetermination of the deficiency determined by the Commissioner. The Tax Court of the United States by its decision entered June 14, 1956, upheld the Commissioner and determined a deficiency against petitioners in the amounts of $2,458.22 and $925.76 for the taxable years 1949 and 1950, respectively [Tr. Rec. p. 52].

**The Question Involved.**

Were the total periodic payments made by Jo Eisinger to his divorced wife Wilhelmina Eisinger in 1949 and 1950 properly deductible by appellants Jo and Lorain Eisinger on their Income Tax Returns filed for those years as periodic payments which Jo Eisinger was obligated to make pursuant to an agreement incident to a decree of divorce as contemplated by Section 22(k) of the 1939 Internal Revenue Code, and hence proper deductions under Section 23(u) of said Code?

**The Tax Court Decision.**

The Tax Court disallowed fifty per cent (50%) of the deductions taken by appellants on the ground that construing the agreement as a whole, fifty per cent (50%) of the amount payable to the wife was identifiable as being for the support of the two minor children [Tr. Rec. pp. 44-45].

## Specification of Error.

The Tax Court erred in its holding that part of the sums paid by Jo Eisinger to Wilhelmina Eisinger during the years 1949 and 1950 represented payments for child support rather than payments of alimony.

## ARGUMENT OF THE CASE.

### The Facts.

The parties have stipulated that Jo Eisinger and Wilhelmina Eisinger were husband and wife; that in 1943, Jo Eisinger obtained an uncontested divorce from Wilhelmina Eisinger and married appellant Lorain B. Eisinger; that in 1949, on her own account, Wilhelmina instituted a suit for absolute divorce from Jo Eisinger; that on May 26, 1949, the final decree of divorce was entered; that at said time Jo Eisinger and Wilhelmina Eisinger were the parents of two minor children; that in connection with said suit for divorce, the parties thereto entered into a written property settlement agreement dated March 28, 1949; that said property settlement agreement was subsequently modified by a written agreement dated May 19, 1949; that the original agreement and the modification thereof were incorporated into the above-mentioned decree of divorce dated May 26, 1949; that pursuant to the terms of said written agreement as modified, and said judgment, appellant Jo Eisinger made payments to Wilhelmina Eisinger in the sums of $3,850.00 and $6,677.00 for the calendar years 1949 and 1950 respectively; that appellants filed joint individual income tax returns for the taxable years 1949 and 1950 and on said returns deducted $3,850.00 and $6,677.00 for the years 1949 and 1950 respectively; that in his statutory notice determining deficiencies, respondent disallowed appellants' deductions as alimony in the sums of $1,925.00 and $3,364.50 for the years 1949 and 1950 respectively; that the determination of whether the payments in question were alimony payments or payments for the support and maintenance of the minor children was the only issue

for the Tax Court to resolve; that the original written property settlement agreement and the modification thereof are as set forth in exhibits to the Stipulation as to Facts [Tr. Rec. pp. 35-40].

**Introduction to Appellants' Argument.**

The terms of the written instrument as incorporated into the decree of divorce do not fix an amount of money or a portion of the payment as a sum payable for the support of minor children.

As stated before, the sole question presented in this case and on this appeal was and is whether appellants deducted as alimony, payments made to Jo Eisinger's former wife which were in reality payments made "for the support of minor children." The Tax Court sustained the Commissioner's position that of the payments of $125.00 per week made pursuant to the agreement, $62.50 per week was identifiable as being for the support of the minor children [Tax Court Memorandum Decision, Tr. Rec. p. 44]. The Tax Court in its opinion, stated:

> "It is the petitioner's position that the separation agreement provides for the payment of a lump sum to his former wife without specifying the amount to be applied for the support of the children. It is argued that although the agreement provides for the reduction of the total amount payable to the wife by fixed amounts under certain contingencies, until such contingencies arise there is no way of determining what part of the lump sum is for the support of the children, and the rationale of the cases of *Dora H. Moitoret*, 7 T. C. 640, and *Henrietta S. Seltzer*, 22 T. C. 203, is applicable here.
>
> "The respondent contends that the agreement must be construed in its entirety, and when so considered

it is clear that one-half the amount to be paid to the wife represents an amount fixed as payments for the support of the minor children.

"It has been repeatedly held that an adequate consideration of the problem presented requires a construction of the agreement as a whole. *Robert W. Budd,* 7 T. C. 413, aff'd per curiam, 177 F. 2d 198; *Warren Leslie, Jr.,* 10 T. C. 807; *Mandel v. Commissioner,* 185 F. 2d 50, affirming a memorandum opinion of this court.

"On this record, we hold that the amount for the support of the children is identifiable, and the cases relied upon by the petitioner are factually distinguishable. It follows that the determination of the respondent on this issue must be sustained." [Tr. Rec. pp. 44-45.]

It is appellants' earnest contention that the Tax Court decision is in error. Proof of such error involves consideration of:

(a) The relevant portions of the applicable sections of the 1939 Internal Revenue Code.

(b) The relevant portions of the Regulations to the 1939 Internal Revenue Code.

(c) The relevant portions of the agreement in question.

(d) The points in appellants' argument.

**(a) The Relevant Portions of the Applicable Sections of the 1939 Internal Revenue Code.**

Internal Revenue Code, Section 22(k) provides (in part) that where

"a wife . . . is divorced . . . from her husband under a decree of divorce . . . periodic payments . . . received subsequent to such decree

> in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce . . . shall be includible in the gross income of such wife. . . ."

However, Section 22(k) proceeds to state that

> "[t]his subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband."

Section 23 provides

> "[i]n computing net income there shall be allowed as deductions . . . (u) . . . . In the case of a husband described in Section 22(k) amounts includible under Section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year."

Under the Code, only where payments made by the husband to the wife qualify for inclusion in the wife's income under Section 22(k), may the husband deduct such payments under Section 23(u). Therefore, where payments made are "payable for the support of minor children," within the meaning of Section 22(k), they may not be deducted by the husband.

(b) **The Relevant Portions of the Regulations to the 1939 Internal Revenue Code.**

Regulation 111, Section 29.22(k)—1 reads in part:

> "In general, Section 22(k) requires the inclusion in the gross income of the wife of periodic payments . . . received by her after the decree of divorce. . . .
>
> . . . . . .
>
> "(d) . . . Section 22(k), does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under Section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. . . . *If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in Section 22(k).*" (Emphasis added.)

Note, that in the regulations the respondent, Commissioner of Internal Revenue, provides that there *must be specific designation of that portion for the support of minor children in order for the wife to exclude a portion of the payment from her income, and consequently, in order for the husband to include a portion thereof in his income.*

Regulation 111, Section 29.23(u)—1 reads in part:

> "A deduction is allowable under section 23(u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the

payee wife or former wife, as the case may be, under section 22(k). As to the amounts required to be included in the income of the wife or former wife as the case may be, see section 29.22(k)—1."

**(c) The Relevant Portions of the Agreement.**

Following are the provisions of the agreement between Jo and Wilhelmina Eisinger which are relevant to the court's determination of this controversy.

"Property Settlement Agreement

"This Agreement . . . by and between Joseph Eisinger, hereinafter referred to as the 'Husband', and Wilhelmina Eisinger, hereinafter referred to as the 'Wife'.

"Witnesseth:

"Whereas, the Wife has instituted an action for divorce against the Husband, and

"Whereas, the parties desire to settle all differences between them,

"Now, Therefore, in consideration of the premises and of the terms and conditions hereinafter set forth, It Is Agreed:

"2. The Wife shall have the custody of the children of the marriage, viz., Carl Eisinger . . . and Lloyd Eisinger. . . .

. . . . . .

"4. The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week, commencing upon the date of the entry of the final decree of divorce in the action presently pending between the parties in the Circuit Court of the 11th Judicial Circuit of Florida . . . and weekly thereafter, and in consideration thereof the Wife agrees to support the

Aforesaid children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said weekly alimony. Said payments shall continue during the life of the Wife and shall cease upon her death or upon the death of the Husband. Upon the remarriage of the Wife all alimony payments to her shall cease, but in lieu thereof the Husband shall pay the sum of Thirty-one and 25/100 Dollars ($31.25) per week for the support and maintenance of each child of said marriage until such child shall attain the age of twenty-one (21) years, at which time the aforesaid payments for such child shall cease and terminate. Whether or not the Wife shall remarry, as each child shall attain the age of twenty-one (21) years, the aforesaid alimony shall be reduced by Thirty-one and 25/100 Dollars ($31.25) per week for each child thus attaining the age of twenty-one (21) years. It is the intention of the parties that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay to the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week during her life and until her remarriage; provided, however, that no alimony shall be paid to the said Wife if the Husband shall die or if the Wife shall have meanwhile remarried or shall have died. It is also agreed that the said payments of alimony to the Wife shall be reduced by the sum of Thirty-one and 25/100 Dollars ($31.25) per week in the event of the death of either of said children before he shall have attained the age of twenty-one (21) years, and if both of said children shall die before attaining said age the alimony for said Wife shall be reduced by the sum of Sixty-two and 50/100 ($62.50) per week.

"6. (a) The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage. This agreement constitutes a complete and final settlement of any and all claims, property rights, liabilities and obligations of the parties hereto in, on or as to each other, and each party shall have such rights in and to his or her person, earnings, income and property as though said parties had never been married to each other, save and except as herein provided, and each of the parties hereto, except as herein provided, renounces any and all claims for alimony, support, maintenance, attorney's fees and court costs which he or she might have against the other by reason of their marital status from this date henceforth.

"7. The Wife agrees that she will present this agreement to the Court with the request that the same be ratified, affirmed and approved by the Court as its own act and made a part of the final decree of divorce in the action hereinbefore described. . . ." [Tr. Rec. pp. 19-32.]

**(d) The Points in Appellants' Argument.**

In the Tax Court, appellants contended that the separation agreement provided for the payment of a lump sum each month to the former wife without specifying the amount to be applied for the support of the children. The Commissioner contended that the separation agreement must be construed in its entirety to determine whether any part of the amount paid to the wife represented an amount fixed as payments for the support of the minor children. The Court held that on the record, "the amount for the support of the children is identifiable", and gave judgment for Respondent [Tr. Rec. p. 44].

Appellants contend that construction of the instant agreement in its entirety leads to the inescapable conclusion that no part of the payments made under the agreement were for the support of the minor children within the meaning of Section 22(k) of the Internal Revenue Code. Following are the points in appellants' argument:

## I.

## The Tax Court Was Wrong in Holding Part of the Payments Made Were "Payable for the Support of Minor Children."

In the case of *Weil v. Commissioner,* 240 F. 2d 584 (2nd Cir. 1957), for the first time an appellate court has given careful consideration to the meaning of the words "payable for the support of minor children" as used in Section 22(k) of the 1939 Code. The facts and the decision of the court in the *Weil* case are as follows.

In 1940, as an incident to a decree of divorce, husband and wife entered into an agreement which, *inter alia,* provided in substance in Article 13 thereof that during the term of the joint lives of husband and wife,

> "in lieu of and in full payment, satisfaction and discharge of all obligations of the Husband for the support, maintenance and education of the children . . . [s]o long as the Wife shall attempt . . . to . . . fulfill the provisions . . . on her part to be performed . . . Husband shall pay the sums as provided in this Article in full payment of . . . all obligations . . . to support, maintain and care for the Wife and the children of the parties." (22 T. C. 612, 617 (1954).)

Under Article 13, the husband promised to pay the wife $9,600.00 per year which sum was to be increased to

$12,000.00 maximum or decreased to a minimum of $5,000.00 upon specified variations in the husband's income. No revision in payments was to be made in the event of death or majority of the children. Article 14, which was to be operative only in the event of wife's remarriage provided that:

> "(a) Husband shall pay to the Wife, for the support, maintenance and education of the children, the sum of $400 a month, so long as such children shall continue to reside with said Wife.
>
> "(b) In the event of the death or marriage of either child, or in the event either child no longer resides with the Wife, said payments shall be reduced by $200 per month for each such child." (22 T. C. 618.)

On this record, the Tax Court held that 50% of the payments made by the husband to the wife in the years in question were under the agreement payable for the support of the minor children. The Tax Court stated:

> "It has been held that an 'adequate consideration of the problem here presented requires a construction of the agreement as a whole, and the reading of each paragraph in the light of all the other paragraphs thereof.' *Robert W. Budd*, 7 T. C. 413, aff'd per curiam 177 F. 2d 198. It has been noted, also, that 'each case depends upon its own facts and specifically on the terms and provisions of the decree or written instrument.' *Warren Leslie, Jr.*, 10 T. C. 807, 810; *Harold M. Fleming*, 14 T. C. 1308. See, also *Mandel v. Commissioner*, 185 F. 2d 50. Cf. *Dora H. Moitoret*, 7 T. C. 640.
>
> "Upon considering the entire agreement of August 9, 1940, considering each article and each subsection with the other, we conclude that the agreement fixes

a portion of the periodic payments, namely, 50 per cent, as a sum which is payable for the support of the two minor children, or 25 per cent, as a sum which is payable for the support of each minor child." (22 T. C. 621, 622 (1954).)

On Petition for Review, the United States Court of Appeals for the Second Circuit reversed the Tax Court on the issue discussed above and held that no part of the husband's payments were for the support of the minor children under the terms of Section 22(k) of the Internal Revenue Code. The following is an excerpt from the Second Circuit's opinion:

"Prior to the Revenue Act of 1942, alimony was not treated as part of the wife's taxable income. By Section 120 of that Act, however, certain alimony payments were included in her gross income and the husband was allowed an equivalent deduction. 56 Stat. 798, 816. But the statute excepts from its coverage that part of such payments 'which the terms of the decree or written instrument fix . . . as a sum which is payable for the support of minor children.'

"The Tax Court has held that the terms of the agreement now before us did 'fix' a part of the payments to be made by the husband thereunder as sums 'payable for the support of minor children.' We disagree.

"The cases construing and applying the terms of the statute have been numerous. In the bewildering maze of different types of separation agreements, containing a great variety of clauses requiring payments to the wife for her own maintenance and for the support of minor children, the Tax Court seems gradually to have drifted into a series of decisions,

including the one at bar, which conclude that a particular agreement does 'fix' sums 'payable for the support of minor children,' when it plainly does not.

"The key words of the statute are 'payable for.' The context of Section 22 demonstrates that the Congress used this phrase advisedly. The wife is not relieved of taxability on sums which she in fact expends for the support of minor children, but only on such sums as 'the terms of the * * * instrument fix * * * as * * * payable for' that purpose. The statute taxes to the wife sums which are available for her own use or benefit—whether or not she has undertaken to support the minor children—and does not tax to the wife sums she is required to devote exclusively to the support of the children. What vitiates the decision of the Tax Court in this case is its holding that sums may be 'payable for the support of minor children,' even though the wife may be free to use them for other purposes.

"Despite two decisions seemingly to the contrary, *Henrietta S. Seltzer*, 22 T. C. 203, and *Dorothy Newcombe*, 10 T. C. M 152, aff'd on another point, 9 Cir., 203 Fed. (2d) 128; the Tax Court has, in a series of cases culminating in the case at bar, adopted the position that it is enough if anywhere in the instrument there is mentioned a sum thought to be appropriate for the support of minor children under some circumstances. This erroneous principle emerges from the cases, although they do not articulate any basis for distinguishing between sums 'payable for the support of minor children' and sums not so payable. Rather, they proceed upon the false assumption that, whenever sums are to be paid for the support of both the wife and the children, some

portion must be 'payable for' the children, and that it is the duty of the court to go over the instrument with a fine-tooth comb to discover a figure which might be used as a basis for a division of the tax burden. That such was the approach of the Tax Court in this case appears unmistakably from a reading of its opinion. See 22 T. C. 612.

"We hold that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein. This cannot be the case if the terms of the instrument contemplate a continuance of the payments to the wife after she has ceased to support the children. The fortuitous or incidental mention of a figure in a provision meant to be inoperative, unless some more or less probable future event occurs, will not suffice to shift the tax burden from the wife to the husband.

"We now turn to the agreement to see whether, in the light of the principles just stated, its terms fix any amount as payable for the support of minor children.

". . . We think it plain that the wife undertook the obligation of supporting the children as part of the consideration on her part and that the husband undertook to make payments to the wife as part of the consideration on his. In these circumstances one would not expect to find in the agreement any requirement that the wife devote a particular portion of the payments to the support of the children; and there is none.

"Except in the remarriage clause, the agreement nowhere requires the wife to devote any specified amount to the support of the children, nor, unless she remarries, are the payments to her to be reduced if it becomes no longer necessary for her to support either or both of the children. . . .

"We agree with the statement of the Commissioner in his brief that in order to sustain the determination of the Tax Court, it is necessary to find in the agreement 'sufficient provisions showing an intention on the part of Charles Weil to provide for his minor children specifically, as distinct from an intention to provide for his former wife and have her in turn provide for the children'. But we are convinced that the agreement contains no such provisions. It is quite true that the agreement must be read as a whole, *Mandel v. Commissioner,* 7 Cir., 185 Fed. (2d) 50; *Budd v. Commissioner,* 6 Cir., 177 Fed. (2d) 198, and that no particular formula, such as the phraseology we have quoted from Section 22(k), is necessary. This particular instrument, however, must be construed as expressing the husband's intention to make payments to the wife and have her support the children, the very converse of what the Commissioner states is necessary to support the orders of the Tax Court in these cases." (240 F. 2d 587-588.)

Appellants contend that in the *Weil* case, the Second Circuit announced the true meaning and application of Section 22(k), and urges this Court to express its approval of and concurrence with the Second Circuit decision.

The Second Circuit held that "sums are 'payable for the support of minor children' when they are to be used

for that purpose only. Accordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein." (240 F. 2d 588.) In the instant case, nowhere in the agreement between appellant Jo Eisinger and his former wife is the use of any part of the $125.00 per week restricted to the support of the minor children only, but on the contrary, in return for the wife's agreeing to support the minor children, she is given unrestricted use of the money paid to her.

Appellants contend that as in the *Weil* case, here too it is "plain that the wife undertook the obligation of supporting the children as part of the consideration on her part and that the husband undertook to make payments to the wife as part of the consideration on his. In these circumstances one would not expect to find in the agreement any requirement that the wife devote a particular portion of the payments to the support of the children; and there is none." (240 F. 2d 588.)

Note also, that the Tax Court in the instant case was guilty of the exact same conduct criticized by the Second Circuit. In speaking of the Tax Court cases culminating in *Weil v. Commissioner,* the court stated that

> ". . . they proceed upon the false assumption that, whenever sums are to be paid for the support of both the wife and the children, some portion must be 'payable for' the children, and that it is the duty of the court to go over the instrument with a fine-tooth comb to discover a figure which might be used as a basis for a division of the tax burden. That such was the approach of the Tax Court in this case appears unmistakably from a reading of its opinion. . . ." (240 F. 2d 584-588.)

And, that such was the approach of the Tax Court in the instant case is certain. The court stated

> "[o]n this record, we hold that the amount for the support of the children is identifiable, and . . . [i]t follows that the determination of the respondent [Commissioner of Internal Revenue] . . . must be sustained." [Tr. Rec. p. 44.]

Nowhere is there a finding by the Tax Court, nor is there anything in the record which would support a finding that any part of the payments made by appellant Jo Eisinger to Wilhelmina Eisinger was to be used only for the purpose of supporting the minor children. On the contrary, the record demonstrates beyond a reasonable doubt that no such promise was extracted from Wilhelmina Eisinger, nor was any such promise made by her.

Here two points should be noted. First, the agreement provides

> "Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week . . . and in consideration thereof the Wife agrees to support the . . . children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said weekly alimony." [Tr. Rec. p. 28.]

That is in the event of the wife's breach thereof by failure to support either or both of said children, the husband may pay the cost thereof and deduct the costs from the alimony. It is interesting that *here there is no provision for fixed reduction of payments to the wife, but merely for the husband to deduct actual costs of support.* Second, the agreement without deviation refers to payments to the wife as "alimony". Alimony is defined as an allow-

ance made for the support of the wife where there exists a divorce or legal separation. (27 C. J. S., Divorce, Sec. 202, p. 883.) Both of these points lead to the inevitable conclusion that no part of the payments provided to be paid to the wife were intended to be applied by the wife for the support of the children and that the agreement did not require the wife to apply any part of said payments for their support. Thus, under the *Weil* case, no part of the payments were for the support of minor children, and the Tax Court conclusion that part of the payments made were for such support was erroneous.

## II.

## All of the Decisions Cited and Relied Upon by the Tax Court Were Based on a Misconstruction of the Words "Payable for the Support of Minor Children."

In its decision in the instant case, the Tax Court cited and relied upon *"Robert W. Budd,* 7 T. C. 714, aff'd per curiam, 177 F. 2d 198; *Warren Leslie, Jr.,* 10 T. C. 807; *Mandel v. Commissioner,* 185 F. 2d 50. . . ." [Tr. Rec. p. 44.] In each of these cases, without discussion thereof, the court placed a construction on the words "payable for the support of minor children" in Section 22(k) of the 1939 Internal Revenue Code which is completely incompatible with the construction given thereto in *Weil v. Commissioner,* 240 F. 2d 584 (2nd Cir. 1957). Appellants assert that in those cases, the courts failed to give adequate attention to the words of the statute, and consequently fell into error in concluding that parts of the payments made therein were "payable for the support of minor children." Briefly, the circumstances in each of these cases cited by the Tax Court are as follows:

**Robert W. Budd, 7 T. C. 413 (1946), Affirmed Per Curiam, 177 F. 2d 198 (2nd Cir., 1947).**

The husband and wife entered into a separation agreement which was incorporated into a decree of divorce providing that so long as the wife remained single, the husband was to pay her $500.00 per month "for her support and for alimony, and the support of Robert Ralph Budd until he is ready to enter college to complete his education." (7 T. C. 414.) The agreement further provided that should the wife remarry, payment to her "for the maintenance, care, education and support" of the minor child was to be $200.00 per month until the child was ready to enter college, and, in the event of death of the child or upon attaining age 21, the husband was to pay the wife $300.00 per month as long as she remained single. On the wife's divorce, the court ordered compliance with the agreement. The Tax Court held that $2,400.00 a year of the $6,000.00 paid the wife was for child support. The court stated that when the agreement is read "as a whole" and each paragraph is read "in the light of all the other paragraphs thereof . . . it seems to us apparent that . . . the sum of $2,400.00 represented an amount fixed by the terms of the agreement . . . as a sum payable for the support of petitioner's minor child, and we have so found." (7 T. C. 413, 417.) On appeal, the Court in a *per curiam* opinion, affirmed the Tax Court decision. (*Budd v. Commissioner*, 177 F. 2d 198 (6th Cir. 1947).) In neither opinion does the court discuss the meaning of "payable for the support of minor children," but, seems to assume that whenever any term in the agreement can be seized upon as indicating that part of the payment *may have* been thought of by the parties

as compensation to the wife for supporting the child, that part is not deductible under Section 22(k). There is no evidence in the reports that the agreement required the wife to expend any part of the sums paid to her only for the child's support.

**Warren Leslie, Jr., 10 T. C. 807 (1948).**

The husband agreed to make payments to his wife based on a percentage of his income so long as the wife was alive and not remarried, "for her personal support and maintenance and for the support and maintenance of the . . . children." (10 T. C. 808.) The agreement also provided for the husband to support the children upon the death or remarriage of the wife.

> ". . . [H]owever . . . the payments to the wife for her personal support and maintenance and for the support and maintenance of the . . . children shall in no event be less than the sum of Thirty-six Hundred Dollars ($3,600.00) per anum (sic) but in the event of the remarriage of the wife the sum for the maintenance of the children shall not be less than Twenty-four Hundred Dollars ($2,400.00) per annum." (10 T. C. 809.)

In the years in question, the minimum $3,600.00 was paid by the husband. Relying on a "construction of the agreement as whole" and in particular upon the fact that during the years in dispute, the minimum payments of $3,600.00 were made, thus "invoking in part" the last quoted sentence of the agreement, the Court held that $2,400.00 was not deductible by the husband because it was "payable for the support of minor children." Again, the opinion reveals neither a finding of fact nor any facts which would sup-

port a finding that the wife was obligated by the agreement to apply any specific part of the payments made to her for the support of the minor children.

**Mandel v. Commissioner, 185 F. 2d 50 (7th Cir., 1950).**

By agreement incident to a divorce decree, the husband agreed to pay the wife $18,000.00 per year at the rate of $1,500.00 per month for her life "for the support and maintenance of the wife and their two children." However, in the event of the remarriage of the wife, payments to her were to be reduced to $833.33 per month, and if a child died, payments were to be reduced by $416.66 for each child so dying. On returns for the years in question, the husband only sought to deduct $8,000.00 for alimony paid to the wife of the $18,000.00 paid each year. In the Tax Court the husband first claimed he could deduct the full $18,000.00 for each year on the theory that no part was "payable for the support of minor children." The Court of Appeals for the Seventh Circuit affirmed the Tax Court interpretation "that the agreement as a whole sufficiently earmarked and designated $10,000 of each annual payment for the support of the children." (185 F. 2d 52.) As in the other cases cited by the Tax Court in its decision in the instant case, there are no facts to support a finding, nor is there a finding that the wife was obligated to apply any part of the payments made to the support of the children. Thus, as in the *Budd* and the *Leslie* cases, *supra,* the Court misconstrued the meaning of "payable for the support of minor children" and thereby came to an incorrect conclusion, that is, one at variance with that reached by the Court of Appeals for the Second Circuit in the *Weil* case.

In addition, appellants feel that the decision in *Mandel v. Commissioner* may be distinguished on the basis of what the Seventh Circuit subsequently said about that case in *Joslyn v. Commissioner,* 230 F. 2d 871 (7th Cir. 1956). In discussing *Mandel,* the Court said:

> "There, we construed a separation agreement which contained provisions apparently in conflict. In one provision the husband was required to pay $18,000 for the support of his wife and children; *another provision, however, designated the amount which the wife was required to use for the support of the children.* Thus, it was merely a matter of calculation to determine the portion of the total which was payable to the wife as alimony." (Emphasis added.) (230 F. 2d 879.)

If the court based its decision on a finding that a certain sum was designated "which the wife was required to use for the support of the children," then the *Mandel* case is completely compatible with *Weil v. Commissioner, supra.* However, since in the instant case, there is no such finding of fact, nor any provision from which the Court could find that the wife was required to use any specific amount for the support of the children, on the basis of this interpretation of the *Mandel* decision, the Tax Court should have concluded that no part of the payments made herein were for the support of minor children, and held for the appellants.

## III.

## Properly Construed, the Property Settlement Agreement and the Divorce Decree Embodying It Provide Only for Alimony Payments to the Wife.

Appellants assert that properly construed, the property settlement agreement as embodied in the divorce decree provides that the payments made to the wife thereunder are payments of alimony, and not for support of the minor children. Reference is made to the relevant terms of the agreement as set forth *supra,* page 11.

Essentially a separation and property settlement agreement such as the one entered into between appellant Jo Eisinger and his former wife, Wilhelmina, is a bargaining transaction whereby the parties thereto seek to settle their respective claims to property, and to adjust and settle the rights to support and maintenance, of the wife and the minor children. See *e. g., In re Yoss' Estate,* 237 Iowa 1092, 24 N. W. 2d 399, 401 (1946); *Weimar v. Weimar,* 25 N. Y. S. 2d 343, 346 (1940); *Denner v. Denner,* 69 N. Y. S. 2d 188, 192; 189 Misc. 484, 487 (1947). The primary rule of construction of contracts is that the court must, if possible, give effect to the mutual intention of the parties. *Wilson v. Brown,* 5 C. 2d 425, 428, 55 P. 2d 485, 486 (1936); *Lemm v. Stillwater Land and Cattle Co.,* 217 Cal. 474, 480, 19 P. 2d 785, 788 (1933); 17 C. J. S. Contracts, Section 295. In construing a written contract, the instrument itself is the first and highest evidence of the intent of the parties in executing it. *Sawyer v. San Diego,* 138 Cal. App. 2d 652, 661, 292 P. 2d 233, 238 (1956); *Davis v. Basalt Rock Co.,* 114 Cal.

App. 2d 300, 303-304, 250 P. 2d 254, 256 (1952). And even if any uncertainty exists as to the meaning of a written contract, "the first rule to be observed is that its interpretation must be determined by its own language." *Canavan v. College of Osteopathic Physicians and Surgeons,* 73 Cal. App. 2d 511, 518, 166 P. 2d 878, 882; (1946); *Hunt v. United Bank and Trust Co.,* 210 Cal. 108, 115, 291 Pac. 184, 187 (1930). It is appellants' position that the Eisinger agreement, as demonstrated by the following factors and provisions therein contained, provides *only* for payments of alimony.

1. At all times, payments to the wife are referred to as alimony [Tr. Rec. pp. 19-30].

2. In consideration of the agreement of the husband to pay the wife $125.00 per week, the wife agrees to support the children [Tr. Rec. p. 28].

3. If the wife fails to support the children, the husband may pay the cost thereof and deduct same from the weekly alimony. Note: The husband retains the right to deduct actual costs, his damages in the event of wife's breach; not any fixed sum [Tr. Rec. p. 28].

4. If "Husband shall be called upon to pay any claim asserted against him by reason of a debt incurred by the Wife, he may stop paying the alimony provided for . . . until the weekly alimony shall have aggregated the amount of such claim or claims" [Tr. Rec. p. 30].

5. "The parties have incorporated in this agreement their entire understanding. No oral statements nor prior written matter extrinsic to this agreement shall be in force or effect" [Tr. Rec. p. 26].

6. Nowhere does the agreement provide for any specific sum to be applied by the wife to the support of the children.

7. Nowhere does the agreement specifically provide that payments to be made to the wife are for "support of children" except, in the event of the wife's remarriage, the husband agrees to pay *in lieu of alimony payments,* $31.25 per week for support and maintenance of each child [Tr. Rec. p. 28].

On the other hand, only two provisions of the agreement can be used as the basis for arguing that part of the payments were intended for child support.

8. Upon remarriage of the wife, all alimony payments cease, but *"in lieu thereof,"* the husband agrees to pay $31.25 per week for support and maintenance of each minor child [Tr. Rec. p. 28].

9. "Alimony" to be reduced $31.25 per week upon death or upon attainment of age 21 by either child [Tr. Rec. p. 29].

The first of these (8) is not operative until the wife remarries. Thus, payment for support and maintenance of the children will not occur until a more or less uncertain future event takes place. Then, it is conceded, the husband may not deduct the payments made. However, during the years in question herein, the wife had not remarried. Thus this clause was inoperative, and should have been disregarded by the Tax Court in its attempt to determine whether the payments provided for were alimony or for child support. As was stated by the court in *Weil v. Commissioner, supra,* "[t]he fortuitous or incidental mention of a figure in a provision meant to be inoperative, unless some more or less probable future event occurs, will not suffice to shift the tax burden from the wife to the husband." (240 F. 2d 588.) (See also, *Warren Newcombe v. Commissioner,* 10 T. C. M. 152 (1957), and

the quotation therefrom set forth below, at page 35) Appellants contend that this clause should not be relied on to show that the agreement provided for payments for child support for another reason. Undoubtedly the husband's intent in providing that the payments were to be for support and maintenance of the children upon the wife's remarriage was to prevent the wife from using the payments thereafter for her own support. This provision convincingly indicates that prior to the time the wife remarried, the husband did not intend to restrict her use of the payments or any part thereof to the support of the children. That is, by expressly providing that upon the occurrence of a certain future event, the money payable would be specifically for the support and maintenance of the children, the husband impliedly indicated that prior thereto, no part of the payments were to be specifically for the maintenance and support of the children.

Thus, the only factor listed upon which the Tax Court ought to have relied in reaching its conclusion that part of the sums were "payable for the support of minor children" is the fact that payments of alimony were to be reduced by $31.25 upon death or attainment of age 21 of either child. Appellants agree that a permissible inference may be drawn from this provision that the parties had in mind that the support of each child would amount to $31.25 per week. However, this is not the only inference that can be drawn. There may have been *other* reasons for the reductions at the specified times. There is nothing in Section 22(k) that prohibits reductions in payments upon specified future events occurring. In the bargaining process, other factors may have been considered such as the future needs of the wife, the future earning capacity of the husband, and the fact that when it became no

longer necessary for the wife to care for the children, it would be possible for her to go to work and obtain an income of her own. In any event, in view of all the factors listed above militating against a finding that part of the payments were for child support, it is difficult for appellants to understand how the Tax Court could have come to the conclusion that, on the basis of the facts, part of the payments were "for the support of minor children" within the meaning of Section 22(k) of the 1939 Code.

Appellants maintain that the provisions of the property settlement agreement here under consideration set up payments which are entirely alimony. In support of this, appellants point to the express terms of the property settlement agreement hereinbefore set out and discussed, and incorporated into the divorce decree as follows:

> ". . . the same is hereby confirmed and adopted by the Court, and the parties hereto are
>
> "ORDERED AND DIRECTED to abide by and fully perform the terms of this settlement in this decree." [Tr. Rec. p. 32.]

In particular, appellants refer to the discussion above and emphasize the fact that the husband did not promise to pay money for the support and maintenance of the children except in the contingency of the remarriage of the wife before death, or attainment of age 21, by both children. And, the decree merely ordered the husband to perform the terms of the settlement, that is, to pay alimony. Appellants assert that this is a vital factor precluding the correctness of any finding that the payments made to the wife were not entirely alimony.

## IV.

## The Case Law Favoring Appellants' Contention That the Tax Court Erred in Finding Part of the Payments Were for the Support of Minor Children.

In *Dora H. Moitoret v. Commissioner,* 7 T. C. 640 (1946), the separation agreement which was confirmed in the divorce decree, provided for the husband to pay the wife "for her care and support and the care and support of minor children, the sum of $250.00 each month. . . ." (7 T. C. 741.) The petitioner (the wife) claimed that the money was intended for child support and used therefor by her. The Court held all to be alimony, stating:

> "Here the alimony in question was payable to the petitioner for her own care and support and for the care and support of the minor children. Hence, it may not be said that the decree or written instrument fixed an amount payable by the husband for the support and care only of his minor children." (7 T. C. 642.)

In *Henrietta S. Seltzer v. Commissioner,* 22 T. C. 203 (1954), the separation agreement bound the husband to pay the wife the sum of $120.00 per month "for the support and maintenance of herself and the two sons." The agreement further provided that if the parties divorced or separated in a jurisdiction other than New York, the judgment would incorporate the agreement, and, that in such event, the husband would pay the wife "for the support and maintenance of herself and the sons the sum of One Hundred Twenty Dollars ($120.00) per month until both have reached their majority. . . ." and, upon remarriage of the wife, the "husband shall pay to the wife the sum of Ninety Dollars ($90.00) per month for

the support and maintenance of the sons." The divorce was obtained in New York.

The court in the *Seltzer* case held that the full $120.00 per month paid to the wife was alimony and therefore taxable as income to her. The court stated that "[n]owhere in the divorce decree itself is any part of the $120 a month designated for the support of the two minor sons. Nor do we think that when the divorce decree is read in connection with the separation agreement that it can be said that any part of the $120 monthly payments has been designated for the support of the two minor sons." (22 T. C. 208.)

It is submitted that the *Moitoret* and *Seltzer* cases are authority upon which this Court should find that the instant agreement did not provide payments for child support. As in the *Moitoret* case, "the decree or written instrument" did not fix "an amount payable . . . for the support and care only of . . . minor children." And as in the *Seltzer* case, no part of the payments made were "designated" for the support of minor children by the decree or the written agreement.

In *Elsa B. Chapin v. Commissioner,* 6 T. C. M. 882 (1947), the separation agreement incorporated into the decree of divorce provided:

> "Third: Support and Maintenance.
>
> A. The Husband shall pay to the Wife for her maintenance and support and for the maintenance and support of the daughters:
>
> '(i) The sum of six thousand dollars ($6,000) per annum in equal monthly installments in advance, commencing on the 2nd day of May, 1941.'
>
> . . .

"(iii) If the marriage between the parties hereto should hereafter be duly dissolved and the Wife should remarry, then the Husband shall not be obligated thereafter to make the payments specified in subdivisions (i) and (ii) above, but if any of the daughters are then still minors, he shall pay to the Wife the following: For each daughter who is then still a minor, the sum of $2,000 per annum for her support and maintenance, such payments to be made in equal quarterly installments in advance, commencing on the date of the remarriage of the Wife and to end in the case of each daughter upon her attaining the age of twenty-one years.'" (6 T. C. M. 833.)

The opinion disclosed no provisions for reduction of the periodic payments to the wife upon the death of any of the three children or upon arrival of any child at the age of twenty-one. Construing the aforesaid provisions, the Court made the following very pertinent analysis:

"The provisions of subparagraph (iii) do not show that $2,000 was to be for the support of each daughter under (i) and that none of the $6,000 was in discharge of a legal obligation towards the wife. It is improper to say under all of the terms of the agreement that no part of the $6,000 was in discharge of a legal obligation of the husband to maintain and support his wife. The law does not permit an allocation, in such cases, but expressly provides that the entire payment shall be included in the income of the wife since no specific part or amount was fixed as payable for the support of the minor children." (6 T. C. M. 884, 885.)

In *Warren Newcombe v. Commissioner,* 10 T. C. M. 152 (1951), it appeared that, pursuant to a divorce decree, the petitioner was required to pay his former wife three-sevenths of his net earnings for a nine-year period for

her support and maintenance, and the support and maintenance of their two minor children. Upon expiration of the nine-year period, or in the event the wife remarried sooner, he was obligated to pay her $100 per month for each child until said child attained the age of eighteen years and thereafter until each child secured a college education or professional training. The Commissioner determined that $2,400 of the annual periodic payments were for support of the two children and hence not deductible as alimony under Section 23(u) of the Code. The Court, in overruling the Commissioner, and finding for the husband, said in part:

> ". . . The obligation to make these payments of $100 per month for each of his children did not arise until after the 9-year period had expired, if Hazel remained unmarried, or if she married during the 9-year period, then his obligation to make periodic payments to Hazel ceased, and his obligation to pay her $100 per month for the maintenance and support of each child arose. *These provisions for maintenance and support of his children are entirely separate and apart, therefore, from his agreement to pay his divorced wife three-sevenths of his net earnings for her maintenance and support and the maintenance and support of their children for the 9-year period or until she remarried during that time.*" (10 T. C. M. 152, 157, aff'd 203 F. 2d 128.) (9th Cir. 1951.) (Italics added.)

The *Chapin* and *Newcombe* cases demonstrate that the factor of forfeiture of alimony upon remarriage by the wife, and the substitution therefore of payments specifically for the support and maintenance of minor children does not require the court to find that part of the payments to the wife before she has remarried are "for the support of minor children."

In *Rubin v. Riddell,* .... F. Supp. ...., 56-2 U. S. T. C. ¶9891 (S. D. Calif., 1956), a decree of divorce required the husband to pay $700.00 per month for the support and maintenance of his former wife and children. The judgment further provided for the husband to pay $200.00 per month less while the children were in his custody. During the years in question, the Commissioner refused to permit the husband to deduct $700.00 per month of the sums paid the wife for the months the children were in her custody, asserting that $200.00 per month of said sum was "paid specifically for the support of said minor children." The husband paid the deficiency assessed and sued in the District Court for refund. The Court held for the husband on the ground that the assessment and collection of the tax was erroneous and illegal, and the full amount of sums paid the wife was deductible within the meaning of the Internal Revenue Code. This case is further authority for the conclusion that the mere fact that the Court can isolate some provision of the agreement or decree upon which it can base an inference that part of the payments payable to the wife may have, within the contemplation of the parties been a sum adequate for the support of the children, is not sufficient for it to find that part of the sum payable was for the support of minor children within the meaning of Section 22(k) of the 1939 Internal Revenue Code.

The case of *Truman W. Morsman v. Commissioner,* 27 T. C. 520 (1956), is authority for the proposition that the fact that payments are to cease entirely upon death or attainment of majority by the children is not sufficient for the Court to conclude the payments are entirely for support of children. In this case, the wife was to be paid $350.00 per month in full discharge of her support of the

child. Under the decree, the child was to spend 6 months with each parent during each year, but when the child was with the father, payments to the mother were to be only $300.00. If the wife remarried, payments were to be reduced to $100.00 per month while the child was with the mother, and $50.00 per month while with the father. In the year in question the husband paid the wife $1,200.00. The Commissioner contended that the entire $1,200.00 was for the support of the child because all payments were to be discontinued completely if the child died or attained his majority. Although the Court's decision that $600.00 of the $1,200.00 paid was for child support and therefore includible in the husband's income is questionable in view of *Weil v. Commissioner, supra,* and the discussion above, the Court's refusal to hold that 100% of the payments was for the support of the child is a clear recognition of the fact that a clause such as the one in the instant case which provides for discontinuance, or reduction of payments upon the death or attainment of majority by the children does not lead inevitably to the conclusion that part or all of the payments provided for were "for the support of minor children."

To summarize, the following general propositions may be derived from the cases discussed in this section:

1. The fact that upon the wife's remarriage, alimony payments are to cease and, as a substitute therefor, payments for the support of minor children in a specific amount are to commence, does not require a finding that some part of the payments made before the wife's remarriage are in reality for the support of minor children.

2. The fact that unsegregated payments made for the support of both the wife and children are to be reduced by a fixed amount upon contingencies which relieve the wife

temporarily or permanently of the necessity of supporting the children, does not require a finding that said fixed amount was "payable for the support of [the] minor children."

It is submitted that on the basis of the cases and the propositions derived therefrom, the Tax Court in the instant case eroneously decided that any part of the payments were for the support of minor children.

Appellants are fully aware that there are cases, in addition to those cited by the Tax Court and discussed above, whose decisions apparently are contrary to appellants' position. However, after analyzing these cases, appellants are convinced that each one may be distinguished from the instant case either on the basis of the facts involved or on the basis that the court erroneously defined the words "payable for the support of minor children." Appellants therefore will not extend the length of this brief in an effort to distinguish each of said cases.

## Conclusion.

The decision appealed from should be reversed; appellants should be allowed full deduction for all payments made by appellant Jo Eisinger to his former wife, Wilhelmina Eisinger, that is $3,850.00 during 1949, and $6,729.00 during 1950, respectively.

Respectfully submitted,

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